

**Before the Finance and Claims Committee  
of the Montana Senate: Regarding HB 454**

April 12, 2013

Exhibit No. 9  
Date 4-12-13  
Bill No. HB 454

Testimony of LeRoy H. Schramm

I am testifying on my own behalf only. I was Chief Legal Counsel for the Montana University System for 25 years until my retirement. So my testimony is that of a lawyer and also a PERS retiree. I speak in opposition to HB 454; specifically that section that reduces the Guaranteed Annual Benefit Adjustment (GABA) for current retirees. The basis for my opposition is that this section is very likely unconstitutional. Legislative committees have been informed of this likelihood by legislative legal staff several times over the past few years, but let me summarize why I believe this to be the case.

**Federal Constitution**, Art. 1, Sec. 10: "No state shall . . . pass any law impairing the Obligation of Contracts . . ."

**Montana Constitution**, Art. II, Sec. 32: "No . . . law impairing the obligation of contracts . . . shall be passed by the legislature."

Court cases indicate that a statute violates these constitutional provisions if three conditions are present. 1. A contract exists. 2. The impairment is substantial. 3. The legislature had reasonable alternatives available that did not impair the contract. All three conditions are met by HB 454 in its present condition.

1. **The GABA is a contractual obligation.** "The terms of [the retiree's] retirement benefit contract are determined pursuant to the statutes in effect at the time of his retirement." *Gulbandson v. Carey*, 272 Mont. 494, 502 (1995). "Benefits . . . to eligible recipients are payable pursuant to a contract as contained in statute. The contract is entered into on the first day of a member's covered employment . . ." MCA 19-2-502.

2. **The impairment is substantial.** There are a multitude of cases that say reductions even less than the proposed GABA reduction meet the test of substantiality. I have not cited them here for the sake of brevity.

3. **The legislature has reasonable alternatives.** The choices before the legislature are not all legally equal. An impairment such as the GABA reduction has to be absolutely the last and just about the only available option available to solve the problem at hand. "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a state could reduce its financial obligations whenever it wanted to spend money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all . . . But a state is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *United States Trust v. New Jersey*, 431 U.S. 1, 26 (1977). This current legislature has available less drastic alternatives. For example, HB 454 as introduced did not reduce the GABA for current retirees and testimony indicated that it would solve the pension funding problem, albeit over a somewhat longer time period.. Unlike some legislatures in the past, this legislature is not facing a state fiscal crisis. With HB 454 in its present form the legislature is just choosing to spend available monies on projects that it likes more than the GABA. This is precisely what the constitutional contract impairment clauses do not allow. Originally passing a 3% guaranteed GABA may not have been wise. But it is now part of a contract for persons who retired when that provision was in statute, and it is just as binding as an individual's contract to pay for a car or house, which can not be abrogated just because the buyer is later dissatisfied. I think it is neither wise nor prudent to pass legislation that is clearly unconstitutional. For that reason I think the passage of HB 454 in its present form is neither wise nor prudent. Thank you for your time and attention.

